

## APPENDIX A

JUDGE LINSKY: Okay, I will now be issuing my bench decision in this particular case, and after I get a transcript from the court reporter I will be issuing a brief summary and then certifying the bench decision. And when you get a copy of that, then you can decide whether or not you want to take exceptions from the decision.

Basically, in my decision I have concluded that the Respondent did not violate Section 8(a)(3) of the Act. However, I find that Respondent did violate Section 8(a)(1) of the Act.

Okay, this a case entitled T&M Painting and Painters & Allied Trades, District Council No. 51, International Brotherhood of Painters and Allied Trades, Case 5-CA-28994.

The charge in this proceeding was filed by the charging party on May 19, 2000. Thereafter, on November 9, 2000, a complaint was issued by the National Labor Relations Board, by the Regional Director for Region 5. Actually, by the Acting Regional Director for Region 5. The Respondent filed an answer in which it denied that it violated the Act in any way.

Essentially, Respondent, I find, is a Maryland corporation with an office and place of business in Baltimore, Maryland, and has been a painting contractor in the building and construction industry. Respondent admits, and I find that at all material times Respondent, and that is what I will refer to T&M Painting as, has been an employer in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

I also find that the Respondent has admitted and I find that at all material times the charging party, Painters District Council No. 51, has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent further admits that Kim Shriver held a position of Respondent's owner and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent of Respondent within the meaning of Section 2(13) of the Act.

By way of background, Respondent has been in business approximately four years. It has been subjected to some kind of picketing at its Baltimore office. This case involves a project that Respondent

was working on at Sibley Hospital in Washington, D.C. In the early part of May, area standards picketing began at Sibley Hospital involving the Respondent.

There came a time when a William "Wink" Dixon applied for a position with Respondent and was hired.

On May 15, 2000, the alleged 8(a)(3) in this case, George Rusche, and another gentleman by the name of Ron Smith, applied for positions with T&M at the Sibley Hospital address. Actually, on that morning three people showed up; and one of them had been previously spoken to by Ms. Shriver and she knew that he was coming to accept the position with Respondent. The other two, Mr. Rusche and Mr. Smith, came wearing "Union Yes" T-shirts, both wearing "Union Yes" T-shirts, and Mr. Smith, in addition, had a union hat. It was clear that these were union affiliated applicants for employment. Nonetheless, both gentlemen were hired and went to work that day, Monday, May 15<sup>th</sup>.

Up till that time, according to William "Wink" Dixon, there had been no rule respecting what people could discuss at work, and people, according to the credited testimony of Dixon, discussed all sorts of things, and they talked and worked at the same time. Even Kim Shriver conceded that the painting business is such that you can talk and work at the same time.

In any event, not longer after George Rusche started working for Respondent Ms. Shriver started receiving some complaints. I credit her testimony that she did receive these complaints. She said she received complaints from her foreman, Allen Miller, as well as from some employees, to include a Craig Fuhr, and these complaints were that Rusche was not working and that he was talking about the union a lot, and it was interfering with production.

Her testimony with respect to receiving complaints was corroborated by the testimony of Craig Fuhr. He testified here yesterday. He no longer works for the Respondent. I don't know if he will ever go work for them again. But he does not work for them at the present time. And he said that when Rusche showed up, that the day that he worked with Rusche on May 16<sup>th</sup>, that Mr. Rusche engaged in, on two occasions during the workday, he would not be working and he would be talking about the union. At one point with Fuhr, who I credit, just before breaktime Mr. Rusche had spent several minutes discussing

the union and then announced that it was breaktime. And when Mr. Fuhr was not about to take a break he even said to Fuhr, "You know, they are not paying you enough, you know, take a break."

Later that afternoon something similar happened when he observed – when he was working and he observed Mr. Rusche not working, but talking about the union. And he complained about this, rightly or wrongly, but he complained about this to Ms. Shriver. So Ms. Shriver was armed with complaints.

She did what, I guess, an intelligent person probably ought to do. She contacted counsel. Mr. Fries, apparently, was not available. She spoke to his partner. And she received certain advice. She was complaining that this was – that Rusche's behavior was interfering with work at the project, and the advice she apparently received was to tell the employees words to the effect that the employees were not to discuss politics, religion or any other nonwork-related topic during working time, but they were free to discuss anything they wanted to discuss before work, after work, on break, at lunch, et cetera, but when they were on working time that they were not to discuss politics, religion or any other nonwork-related topic.

The Respondent submits that this was a nondiscriminatory, reasonable rule triggered by the circumstance that she had received complaints about delays in production caused by people discussing nonwork-related topics during working time. And I find that it was not a violation of the Act for her to promulgate that rule, which she did orally to her employees, at least to some of them, and not all of them, unfortunately, remember her saying that.

In any event, on May 16, Tuesday, May 16, after Ms. Shriver has gotten advice from counsel, after she has received complaints from Miller, which I credit her testimony, although Miller has not been a witness here, but she also received complaints from Craig Fuhr, who did testify, and I credit his testimony, she then went up to see Mr. George Rusche. She was accompanied by Allen Miller, the foreman, as well as the superintendent on the job. Neither Miller nor the superintendent on the job testified.

So what occurred in the conversation between she and Rusche on Tuesday, May 16<sup>th</sup> at about three o'clock in the afternoon, the only people we have testimony from as to what was said are Mr.

Rusche and Ms. Shriver. And I note that from a very practical point of view in crediting witnesses you can credit a witness for some things and not other things, and you can find a witness to be credible on one point and not credible on another point.

I find that with respect to what was said on May 16<sup>th</sup> that the version of what transpired given by Mr. Rusche is more credible than the version given by Ms. Shriver, and I credit Mr. Rusche.

The nondiscriminatory rule that counsel asked her to promulgate was – you know, that employees were not to discuss politics, religion or any other nonwork-related topic during working time, well, needless to say there is not a scintilla of evidence that Rusche ever discussed politics or religion but he did discuss the union. And I credit his testimony as to what was said on that Tuesday afternoon. That is, that as he was painting on a door that Kim Shriver came up and told him that he should stop talking about the union, and if he didn't stop talking about the union, she would fire him. "Don't talk about the union," and she said, directing her words to the superintendent but where Rusche could hear what she was saying said, "If he keeps talking about the union, I'll fire him." As she left she said she was mad, saying "The goddamn union was fucking up my work" or words to that effect. He, of course, said, "I will not stop talking about the union." The superintendent said nothing.

I find that since Rusche was not talking about anything, was not talking about religion or politics, that when Ms. Shriver, upset about the complaints she had received from Miller and from Fuhr, and others, zeroed right in on the problem as she perceived it from Mr. Rusche, which was, namely, him talking about the union, and I think that she made the threat to him on May 16<sup>th</sup>, in violation of Section 8(a)(1) of the Act.

Okay, the very next day, May 17<sup>th</sup>, in the morning, George Rusche was fired. There was a conversation between Mrs. Shriver and Mr. Rusche. Now, there are real differences in the versions of each as to what happened. Suffice it to say Mr. Rusche says that he was in an area working and that there was a plumber there, and the plumber being from Local 5, apparently a Washington, D.C. local plumbers union.

And Ms. Kim Shriver says, “No, no, you know, he was with the plumber the day before when I spoke to him. On the day that I fired him, on May 17<sup>th</sup>, he was not with the plumber. He was talking to Allen Miller, the foreman.”

So basically we have Rusche saying it was Rusche and the plumber, although Rusche admits that Allen Miller, the foreman, came in later. Kim Shriver says no, there was no plumber there, that was the day before, and that Allen Miller, the foreman, was there, and he was there with Rusche when she came into the room.

Suffice it to say we don’t have the plumber testifying here before us, and in addition, of course, we don’t have Allen Miller testifying either.

And there was a series of – there was an exchange of words between George Rusche and Kim Shriver. According to Shriver, when she entered, Miller and George Rusche were speaking. He was saying that Allen was not being paid enough. Miller said, “Look, man, go back to work” or words to that effect. Rusche said, “You’re not paying enough.” Allen told Shriver that he was nothing but a troublemaker. There was paint being mixed up. There were some problems in job performance, which was not attributable to Mr. Rusche, but nevertheless were causing difficulties on the job, and Allen Miller, the foreman, was threatening to quit.

George Rusche started screaming in Ms. Shriver’s face. He was cursing. According to her, he called her a fucking bitch. He said, “I should punch you in your fucking face.” And in addition, according to Shriver, she told him three times, “Look, go back to work,” even using the word “please” at least once. He did not go back to work. He called her, according to her, a fucking bitch, and said, “I should punch you in your fucking face.” This is extreme language, needless to say.

As a result of that, he was standing there with a brush in his hand, she took the brush from his hand, and in effect told him he was finished with the company, he was fired, terminated.

He said, “Are you firing me because of the union?” And according to her she said, “No, because of insubordination.”

In any event, as I indicated, we don't have the plumber, we don't have the plumber, we don't have Allen Miller, so the question is who do we believe. Are either one of them corroborated in their version of events because of course George Rusche said he never called Ms. Shriver a fucking bitch, he never said, "I ought to punch you in your face" or words to that effect. So who do we believe?

Well, there were some witnesses to parts of what was said who testified. William "Wink" Dixon, who was a witness for the General Counsel said that the language between Mr. Shriver and Mr. Rusche was loud, but he didn't hear anything. Specifically he says he did not hear anything about punching anyone in the face and he did not hear anyone called someone a fucking bitch.

Toby Trettin testified. He said that he had to cross a large part of the building to get to the scene of the confrontation, and he said when he got there it was – toward the end, at the end, and he heard George Rusche say to Shriver, "You're firing me because of the union." And according to Tony Trettin, she said, "No, because of insubordination," corroborating, I think, Ms. Shriver.

In addition, there was a witness that the General Counsel asked me not to credit, but I do credit him. I found David Mount to be a credible witness. I think that counsel for the General Counsel is correct in the sense that he owes Ms. Shriver something because he had worked for her, he was fired for cause and she did rehire him. So yes, he has a motive to corroborate her arguably. But I nevertheless found him to be credible.

His failure, if it indeed occurred of not looking me in the eye or his hesitation on first picking up his left hand rather than his right before he was sworn in is not dispositive to me. I found him credible. And he's significant in two details.

Number one, he said he heard Rusche say – use the "F" word, corroborating Ms. Shriver. In addition, he says he heard Rusche say that, "You're lucky I don't punch you in the face" or words to that effect. And he corroborates Shriver.

Then the question is, okay, assuming arguendo he did say these horrible things, was that the real reason he was fired? What is the track record, if any, with respect to Shriver disciplining people who say things like that?

Well, we know from David Mount, again whom I credit, that approximately a year before this incident that when he was drunk and had gone to the office of Respondent in Baltimore to pick up his pay check and he was intoxicated, that he had encountered Ms. Shriver, and he had called her a whore, and he had been fired. And he had the excuse, if you want to call it that, of being drunk versus saying something the functional equivalent of that arguably cold sober at the workplace.

In any event, she fired him, and the only reason he was rehired is time went by and he repeatedly apologized.

So Shriver says that she fired him for insubordination and in the position letter they indicate that profanity and vulgarity had been used by Mr. Rusche, and I credit Shriver's version of what happened on May 17<sup>th</sup> at the time of the discharge.

And applying the *Wright Line*<sup>1</sup> standard, even though Rusche was involved in protected concerted activities, that he would have been fired anyway; that I think him saying what he said to Ms. Shriver of calling her a fucking bitch and saying "You're lucky I don't punch you in the face," that that was indeed a large part of the grounds for which he was fired, in addition to his failure when told to go back to work three times and not doing it, but continuing to argue for a pay raise for himself and for Miller.

In addition, I look at certain other conduct of Ms. Shriver, for example, Dixon, William "Wink" Dixon walked on the picket line, and he was not discharged right away. There came a time, which is not before me, some time in June when he left the employ of Respondent. In addition, Smith, who had been hired at the same time as Rusche, was not let go.

So in the light of all of that, I conclude that the discharge of George Rusche was not done in violation of Section 8(a)(1) and (3) of the Act. However, Respondent did violate Section 8(a)(1) of the Act in what it said to Mr. Rusche on Tuesday, May 16<sup>th</sup>.

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<sup>1</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 US 989 (1982).

So that's my decision basically. And what I am going to do is put the order and notice in a more formal manner, and I will issue that, and at that point the parties can make a decision as to whether or not they want to take exception to the decision.

Is there anything else that needs to be put on the record at this time? Mr. McCarthy?

MR. MCCARTHY: No, Your Honor.

JUDGE LINSKY: Okay. Mr. Fries?

MR. FRIES: No, Your Honor. Thank you.

JUDGE LINSKY: Okay, case is closed. Thank you very much.

MR. MCCARTHY: Thank you, Your Honor.

MS. SHRIVER: Thank you, Your Honor.